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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 176

ARKANSAS FUEL OIL CORPORATION,
Appellant,

vs.

RUFUS W. FONTENOT, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF LOUISIANA

No. 40,988

ARKANSAS FUEL OIL CORPORATION,
Appellant,

vs.

RUFUS W. FONTENOT, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE JUDGMENT APPEALED FROM, AS REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to the rules of the Supreme Court of the United States, Rule 12, paragraph 1, Arkansas Fuel Oil Corporation, which has filed herein a petition for appeal to the Supreme Court of the United States, files this its statement showing the basis on which appellant contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment herein entered by the Supreme Court of Louisiana, as follows:

I

Statute Sustaining Jurisdiction

The statute believed to sustain appellate jurisdiction is *Section 1257 of Title 28 of the United States Code,* which provides that final judgments or decrees rendered by the

highest court of a state in which a decision could be had may be reviewed by the United States Supreme Court by appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

II

Statute the Validity of Which Is Involved

The statute of the State of Louisiana, the validity of which is involved in this case, is *Act No. 10 of the [First] Extraordinary Session of 1935 (Acts, State of Louisiana, Extra Sessions 1934, 1935, p. 474)*, as amended by *Act No. 201 of 1946 (Acts, State of Louisiana, Regular Session, 1946, p. 585)*, comprising the Louisiana Corporation Franchise Tax Act.[1]

Act No. 201 of 1946 completely revises and re-enacts each section of the Corporation Franchise Tax Act so that it is necessary to refer only to the later Act. The suit involved specifically the validity of the first proviso of the formula, in *Section 1, subsection (4)*, for the allocation within and without the State of each taxpayer corporation's capital. The subsection is quoted as follows:

> "(4) For the purpose of ascertaining the tax hereby imposed, every corporation subject to the tax is deemed to have employed in this State the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on

[1] The suit involves taxes of the years 1946, 1947, and 1948 prior to the revision and codification, in 1950, of the Louisiana statutes; and is, therefore, governed by the original statute rather than the revision. See *Louisiana Revised Statutes, 1950*, "General Provisions", *Title 1, Sections 2 and 16*. The Corporation Franchise Tax Law is carried into the Revised Statutes without any significant alteration. See *Louisiana Revised Statutes, 1950, Title 47, Sections 601 to 616, inclusive.*

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the basis of the ratio obtained by taking the arithmetical average of the following ratios:

(a) The ratio that the net sales and other revenue attributable to Louisiana bears to the total net sales and other revenue. The Louisiana sales factor shall be (1) one-half of the sales secured through the efforts of salesmen attached to or sent from offices, agencies, or other places of business within the State plus (2) one-half of the sales of merchandise delivered in Louisiana.

(b) The ratio that the value of all of the taxpayer's property and assets situated or used in Louisiana bears to the value of all of its property and assets wherever situated or used. In determining value, depreciation and depletion reserves must be deducted from the book values of the properties in question.

Provided that for the purpose of allocation, investments in, advances to, or revenues from a parent or subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for Corporation Franchise Tax purposes by the parent or subsidiary corporation. A subsidiary corporation is any corporation the majority of the capital stock of which is actually, wholly or substantially owned by another corporation and whose management, business policies and operations are, howsoever, actually, wholly or substantially controlled by another corporation; which latter corporation shall be termed the parent corporation.

Provided further, that the portion of capital stock, surplus, undivided profits and borrowed capital allocated for franchise taxation under this Act shall in no case be less than the total assessed value of real and personal property in this State of each such domestic or foreign corporation for the calendar year preceding that in which the tax is due."

(Acts, State of Louisiana, Regular Session, 1946, pp. 585, 589.)

The statute as a whole imposes a tax, annually as of January 1 of each year, on "every domestic, and every foreign corporation, exercising its charter, authorized to do or doing business in this State, or owning, or using any part or all of its capital or plant in this State", *(Section 1(1))*, at the rate of $1.50 for each $1,000 of the amount of each domestic and foreign corporation's "capital stock, surplus, undivided profits and borrowed capital", determined under the law *(Section 1(4)*, quoted above) as being allocable to Louisiana, "for the privilege of carrying on, doing business, the exercise of its charter, or the continuance of its charter within this State", *Section 1(6)*. The minimum tax is $10.

Other sections of the statute require the filing of annual reports with the Louisiana Collector of Revenue by corporations subject to the tax, and for the examination and audit of each taxpayer's report by the Collector of Revenue, who is the administrator and collector of the tax imposed. The statute exempts certain types of corporations *(Section 2)*, provides penalties and various procedures for collection *(Sections 5, 6, 7 and 8)*, forbids the levying of a similar tax by local governmental bodies *(Section 4)*, provides for the disposition of sums collected, incorporates a separability provision *(Section 11)* and contains the following provision as to reports filed under the law *Section 8(4))*:

> "Provided, that all reports rendered to the Collector by corporations taxed under this Act shall be considered confidential and shall be used by the Collector solely for the purpose of assessing and collecting the tax levied by this Act."

III

Date of Judgment and Application for Appeal

The judgment of the Supreme Court of Louisiana here appealed from was entered in that Court on the 22nd day of March, 1954, and appears in the decretal part of the

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Court's opinion in the case. Application for rehearing was denied on the 26th day of April, 1954.

Appellant's petition for appeal, with which this Statement is presented, is dated and presented on the 11th day of June, 1954.

IV

Nature of Case and of Rulings of Court To Bring Case Within the Jurisdictional Provisions Relied On; and Stage in Proceedings When Federal Questions Sought To Be Reviewed Were Raised and Method of Raising Questions and How Passed On.

1. This suit is for the recovery of Louisiana Corporation Franchise taxes assessed by the Louisiana Collector of Revenue for the years 1946, 1947, and 1948, totaling in excess of $96,000, and paid to him under protest by appellant's corporate predecessor, Arkansas Natural Gas Corporation, in November, 1950. The suit was begun by a petition filed in the Nineteenth Judicial District Court of Louisiana, within and for the Parish of East Baton Rouge, by which the taxpayer sought recovery from the Collector of the taxes paid under protest. Among several alternative grounds of recovery, the equal protection clause of the Fourteenth Amendment of the Federal Constitution was invoked by the original petition, *paragraph 9 (Louisiana Supreme Court Tr. p. 10)*, which is here quoted:

> "9. Petitioner also especially pleads the unconstitutionality of the statute, and particularly subsection (4) of Section 1, as amended, on the grounds and for the reasons (1) that the statute denies to petitioner the equal protection of the laws, (2) the classification made by the statute on the basis of the percentage of the capital employed in Louisiana by subsidiaries bears no fair and reasonable relation to the object of the statute, (3) the statute is unequal and taxes at different

rates and at grossly different amounts persons and corporations between whom there exist no reasonable differences, and specifically taxes petitioner at an excessively greater amount than is the case with respect to other domestic and foreign corporations similarly situated, and (4) the tax is arbitrary and excessive in amount, is not uniform, and amounts to double taxation; all in violation of the Constitution of the State of Louisiana, Article 1, Section 2, and Article X, Section 1, and the Fourteenth Amendment of the Constitution of the United States."

2. The judgment of the District Court (*Louisiana Supreme Court Tr. p. 202*) rejected plaintiff's demands and, as authorized by the *Louisiana Constitution, Article 7, Section 10*, plaintiff appealed to the Supreme Court of Louisiana, the highest court of the State. Under the judicial system of Louisiana this appeal presented for review every question submitted to the District Court, including the constitutionality of the statute; see *Hawkins* v. *Costley*, 169 La. 229, 124 So. 837 (1929), and *State ex rel. Schlater* v. *Judge*, 40 La. Ann. 809, 5 So. 407 (1888).

3. The Supreme Court of Louisiana having by its opinion rejected other grounds upon which appellant relied for recovery of the taxes in question, passed on and rejected its claim that the statute denied it the equal protection of the laws. The following extract from the Court's opinion gives its discussion of and ruling upon this question (see Appendix to this Statement, p. 25):

"As to the contention that the statute is unconstitutional in that it denies plaintiff the equal protections of laws, all that need be said is that on such issue we have to be governed by the simple rule that where a tax affects all persons similarly occupied alike and all property in the same classification, the equal protection clause is not violated. See Matthews et al. v. Conway,

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et al., 179 La. 875, 155 So. 255 and Interstate Oil Pipe Line Co. v. Guilbeau, 217 La. 160, 46 So. 2d 113.

"Counsel for plaintiff point out, by way of illustration, certain situations where the tax might result in inequalities in assessment and in its determination under the statute. The cases they suggest are based on certain hypothetical facts which do not exist in this case. We, of course, are limited to an interpretation of the statute as it has to be applied to the facts of the case before us and in which no discrimination against the plaintiff or in favor of other corporations similarly situated, appears."

The judgment of the Supreme Court of Louisiana is contained in the concluding paragraph of its opinion (see Appendix to this Statement, p. 26), as follows:

"We conclude that all the issues presented have been correctly disposed of by the judgment appealed from and for the reasons assigned it is affirmed at the costs of the plaintiff, appellant herein."

Appellant's application for rehearing was denied on the 26th day of April, 1954.

4. Among many cases believed to sustain the jurisdiction of the Supreme Court of the United States there is cited *Chesebro* v. *Los Angeles County Flood Control District*, 306 U. S. 459, 83 L. Ed. 921, 59 S. Ct. 622 (1939).

5. Appellant appends to this Jurisdictional Statement a copy of the opinion delivered in this cause by the Supreme Court of Louisiana upon the rendering of the judgment appealed from. There are no other opinions of the Supreme Court of Louisiana in the case or in any companion cases.

V

Grounds For Contention That Questions Involved Are Substantial

From about 1935 to April, 1953, appellant, a Delaware corporation, whose corporate name was then Arkansas Natural Gas Corporation, was a holding company registered under the Public Utility Holding Company Act of 1935. Its two principal subsidiaries were Arkansas Fuel Oil Company, engaged in the oil business, and Arkansas Louisiana Gas Company, a gas utility. In order to avoid confusion it should be noted that in 1953 appellant merged with its oil company subsidiary, and the name of the merged company was changed to Arkansas Fuel Oil Corporation. That corporation, the present appellant, was substituted as plaintiff appellant during the pendency of the appeal in the Supreme Court of Louisiana.

Of appellant's total capital of some $61,000,000, about $60,000,000 was invested in the stocks and debt securities of its two named subsidiaries. In this suit appellant strongly urged on the trial court and the Supreme Court of the State its contention that these intangible investments had no situs in Louisiana and therefore could not be taken into account, for the purpose of fixing petitioner's franchise tax, as property in the State. This ground for the recovery of the taxes assessed for 1946, 1947, and 1948 was denied, and although the Court's ruling on it presented a question of due process of law, that ruling is not assigned here as error.

But the Louisiana Franchise Tax Law by reason of the provision contained in *subsection (4) of Section 1* (quoted above, *subdivision II* of this Statement) for the allocation to Louisiana of capital invested in subsidiaries, operates to tax the capital of holding companies such as appellant in

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a manner so erratic as to discriminate in an extreme way between corporations similarly situated. In 1946, a typical year, appellant's capital was invested in its two subsidiaries to the extent of $59,908,000. One of the subsidiaries, Arkansas Louisiana Gas Company, operated both within and without Louisiana and paid a franchise tax for that year of about $16,000 based on an allocation of 28.7% of its capital to this State. The other subsidiary, Arkansas Fuel Oil Company, which also operated within and without Louisiana, paid a Louisiana Franchise Tax for that year of $19,500, based on an allocation to Louisiana of 34.2% of its capital. Following the provisions of *subsection (4) of Section 1* of the statute, the Collector allocated to Louisiana appellant's capital of $60,000,000 by assigning to Louisiana its investments in and revenues from these two subsidiaries to the extent of their respective Louisiana Franchise Tax ratios, namely, 28.7% and 34.2%. This resulted in allocating appellant's total capital to Louisiana to the extent of 31.8% and in a tax for that year of $29,000, recovery of the greater part of which is here sought.

The rate of tax upon appellant's capital, invested in the stocks and other securities of subsidiary corporations, increases directly, therefore, as the subsidiaries bring a greater part of their own property and activities into the State of Louisiana and thus increase their franchise taxes. On the other hand corporations whose capital is invested in securities of subsidiaries which operate entirely without the State of Louisiana, but whose business, property and activities in Louisiana are otherwise identical with appellant's, pay only the $10 minimum tax. The Stipulation of Fact upon which this case was tried, in *Section 13 (Louisiana Supreme Court Tr. p. 51)* described this unequal treatment, as follows:

> "With respect specifically to the plea of unconstitutionality set forth in paragraph 9 of plaintiff's petition

in this cause, the parties stipulate that there are authorized to transact business in the State of Louisiana, as foreign corporations, a number of corporations organized under the laws of states other than Louisiana, and likewise there are a number of existing Louisiana corporations, which foreign and domestic corporations, herein called 'Holding Companies', own the majority of the capital stock of other corporations and control the management, business policies and operation of such other corporations, herein called 'Subsidiaries'. In the cases of certain of said Holding Companies, there has been assessed and paid for each of the years 1946, 1947, and 1948 the minimum tax under the Louisiana Franchise Tax by reason of the fact that its Subsidiaries operated wholly without the State of Louisiana. In the case of certain other of such Holding Companies, the percentage of allocation of its capital to the State of Louisiana for the purpose of assessing Louisiana Corporation Franchise tax for the years 1946, 1947, and 1948 has been substantially less than was the percentage of the capital of plaintiff allocated to Louisiana under the Act for the corresponding years, for the reason that the percentage of assets and revenues of such subsidiaries which has been allocated to Louisiana was less than that of plaintiff. Likewise, in the case of certain other of such Holding Companies, their capital for those years has been allocated to Louisiana for Louisiana Corporation Franchise Tax purposes in percentage amounts greater than was the case in the corresponding year in respect of capital of plaintiff, for the reason that the percentage of assets and revenues of such subsidiaries which has been allocated to Louisiana was more than that of plaintiff. In the case of such Holding Companies whose capital was allocated to Louisiana in percentage amounts greater or less than was the case in respect of plaintiff's capital, in the years 1946, 1947, and 1948, the varying percentages resulted from the operation of the formula of allocation (based on the allocation percentage of Subsidiaries) contained in Louisiana Corporation Franchise Tax Act, Sec. 1(4)."

Appellant did not name other corporations which are the beneficiaries of this unequal treatment and perhaps this explains the statement in the opinion of the Supreme Court of Louisiana that the claim of discrimination here is hypothetical. It is doubtful, in view of the confidential character given to returns under the statute (see subsection (4) of Section 8 quoted above, this Statement, p. 2), that appellant could have obtained the information to name, and describe the tax imposed upon, such other taxpayers. But it is clear from the Stipulation that there are actually other corporations, otherwise similar to appellant, which pay a nominal tax because their capital is invested in subsidiaries which operate outside Louisiana.

The question posed then is real, concrete and actual. It is: Does the statute deny to appellant the equal protection of the laws by taxing its capital invested in the securities of subsidiaries because the subsidiaries operate extensively in Louisiana, while exempting from tax, wholly or in substantial part, the capital of other holding companies invested in the stocks of subsidiaries which operate outside the State. Under the controlling precedents in the Supreme Court of the United States the question actually becomes narrower, namely, whether the classification established here, placing appellant in one class with a high rate of tax, and other domestic or localized foreign corporations in another class, exempting them, is pertinent to the subject with respect to which the classification is made. See *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 90 L. Ed. 6, 66 S. Ct. 61 (1947); *Railway Express Agency* v. *New York*, 336 U. S. 106, 93 L. Ed. 533, 69 S. Ct. 463 (1949).

Appellant submits that the apparent classification prescribed by the statute, by which the tax of the parent is varied directly according to the Louisiana Franchise Tax ratio of the subsidiary, is wholly illusory. A state taxing measure, whether adopted in a hostile attitude or not, is

invalid if by its necessary operation and effect it brings about discrimination; See *First National Bank* v. *Hartford*, 273 U. S. 548, 71 L. Ed. 767, 47 S. Ct. 462 (1927), a case of discrimination under the national banking laws. And a tax statute which discriminates, as perhaps this Louisiana statute does, as the result of inadvertence, is prohibited by the equal protection provision of Amendment XIV as clearly as is a tax which discriminates through hostility; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 64 L. Ed. 989, 40 S. Ct. 560 (1920). Appellant recognizes that inequalities which result occasionally and incidentally are not forbidden. But the fact that a tax may not be unduly burdensome or harmful and is not confiscatory is irrelevant to the issue of inequality; see *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054, 55 S. Ct. 525 (1935).

The Supreme Court of the United States has decided a number of cases overruling attacks, under the equal protection guaranty of the Fourteenth Amendment, upon state laws taxing investment in or income from corporations where the statute exempts investments in or income from corporations which have themselves borne substantial taxes in the State.

Kidd v. *Alabama*, 188 U. S. 730, 47 L. Ed. 669, 23 S. Ct. 401 (1903);

Darnell v. *Indiana*, 226 U. S. 390, 57 L. Ed. 267, 33 S. Ct. 120 (1912);

Watson v. *State Comptroller*, 254 U. S. 122, 65 L. Ed. 170, 41 S. Ct. 43 (1920);

Klein v. *Board of Tax Supervisors*, 282 U. S. 19, 75 L. Ed. 140, 51 S. Ct. 15 (1930);

Welch v. *Henry*, 305 U. S. 134, 83 L. Ed. 87, 59 S. Ct. 121 (1938);

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Madden v. *Kentucky*, 309 U. S. 83, 84 L. Ed. 590, 60 S. Ct. 406 (1940) (tax on out of state bank deposits at higher rate).

In *Watson* v. *State Comptroller, supra*, there was involved the validity of a New York inheritance tax on bonds which had not borne New York property or stamp taxes. In sustaining the tax the Court's opinion pointed out the justification for the classification, as follows:

> "And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had, during the decedent's life, borne its fair share of the tax burden, and that which had not?"
>
> 254 U. S. 122, 125.

But this reasoning cannot be inverted, and the minor premise substituted for the major. Classification good for one purpose may be bad for another; *Louisville Gas & Electrict Co.* v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770, 48 S. Ct. 423 (1928). As the above cases hold, the State can validly classify investments in stocks as between the stocks of corporations which have themselves paid taxes to the State, and stocks in corporations which have not; and based on this classification may properly exempt from tax investments in the stocks of the former, because that type of property has already contributed to the revenue of the State. But unless some other ground of support can be found, the classification is bad for the purpose of exempting investments in out of state corporations and taxing again investments in the stocks of corporations which have themselves borne a fair share of the State's tax burden.

This is precisely appellant's complaint in this case. The Louisiana statute necessarily operates upon corporations, domestic and foreign, conducting an investment or holding

company business in the State and whose capital is invested in subsidiaries, in such manner as to increase the tax as the subsidiaries increase the proportionate part of their property and activities in the State, and thus increase their own tax; and to decrease the tax as the subsidiaries remove more and more of their affairs from Louisiana, reaching the point of exemption when the subsidiaries entirely remove their property and activities from Louisiana and themselves pay no Louisiana Franchise Tax.

The Supreme Court of Louisiana has not suggested any justification for this classification of taxation as having any reasonable relation to a legitimate end of governmental action, and appellant knows of none. It is submitted that this apparent classification merely singles out appellant for arbitrary discrimination forbidden by Amendment XIV of the Constitution of the United States.

Colgate v. *Harvey, Tax Commissioner*, 296 U. S. 404, 80 L. Ed. 299, 56 S. Ct. 252 (1935);
Wheeling Steel Corporation v. *Glander*, 337 U. S. 562, 93 L. Ed. 1544, 69 S. Ct. 1291 (1949).

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal.

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APPENDIX "A"

OPINION OF THE SUPREME COURT OF THE STATE OF LOUISIANA

SUPREME COURT OF LOUISIANA

No. 40,988

ARKANSAS FUEL OIL CORPORATION

Versus

RUFUS W. FONTENOT, Collector of Revenue of the State of Louisiana

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT OF LOUISIANA, WITHIN AND FOR THE PARISH OF EAST BATON ROUGE; HONORABLE G. CALDWELL HERGET, JUDGE

LEBLANC, *Justice:*

On October 31, 1950, the Collector of Internal Revenue for the State of Louisiana, who will hereafter be referred to as the Collector, made demand on Arkansas Natural Gas Corporation for additional corporation franchise taxes for the years 1946, 1947 and 1948, in the amount of $96,136.88. This was the amount assessed against the corporation over and above the amount of $2,581.20 which it had paid.

The Arkansas Natural Gas Corporation paid the amount demanded, and, availing itself of the provisions of R.S. 47:1576, gave notice to the Collector of its intention to file suit for the recovery thereof. In due time it filed the present suit seeking judgment against the Collector in the amount paid on November 13, 1950 with interest at the rate of two per cent per annum from that date, all as provided for in the same section of the Revised Statutes which affords it this remedy.

In its petition plaintiff avers that it is a corporation organized under the laws of the State of Delaware and domiciled in that State and that it is now and has at all

times been authorized to transact business in the State of Louisiana, its agent for the purpose of serving process in Louisiana being located in Shreveport, Caddo Parish.

It avers that it does not actually engage in or transact business in Louisiana and has not transacted any business in this State since prior to the year 1945. It alleges that it owns all of the issued and outstanding shares of the capital stock of Arkansas Louisiana Gas Company, a Delaware Corporation and Arkansas Fuel Oil Company, a West Virginia Corporation, each of which operates both within and without the State of Louisiana and each having paid all Louisiana Corporation franchise taxes for the years 1946, 1947 and 1948. It annexes to its petition an exhibit which it states correctly sets forth the amounts of its revenues from, investments in and advances to each of the said two corporations and also correctly sets forth, for each of the years 1946, 1947 and 1948, the percentages of the capital of each of the two said corporations which were employed in Louisiana for Louisiana Corporation franchise tax purposes.

The Collector had assessed the additional taxes demanded under the provisions of Act 10 of the Extra Session of 1935 as amended by Act 201 of 1946, (R.S. 47:601) and in this connection plaintiff avers that, because (1) interest and dividends received by it from the other corporations are not revenues attributable to Louisiana and (2) the amounts of its investments in and advances to these corporations are not property and assets situated in Louisiana, the Collector, in so allocating them to Louisiana made a determination of tax liability which is contrary to the provisions of the statute and constitutes an unlawful exaction from petitioner.

In the alternative plaintiff pleaded the unconstitutionality of the statute under which the tax determination was made on the ground that it deprived it of its property without due process of law in violation of both the Louisiana Constitution and the Constitution of the United States; that it denies to petitioners the equal protection of laws and that it is arbitrary and discriminatory, excessive in amount, is not uniform and amounts to double taxation.

The Collector of Revenue answered, placing the conten-

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tions of the plaintiff at issue by denying the pertinent allegations of its petition. Assuming the position of a plaintiff in reconvention he then alleges that if the Court should find that plaintiff's investments in and advances to Arkansas Louisiana Gas Company and Arkansas Fuel Oil Company are not properly allocable in part within and in part without the State of Louisiana, under the provisions of the statute, then the entire amount of such investments and advances shall constitute property situated in Louisiana by virtue of plaintiff's commercial domicile being located in this State. Computing the corporation franchise tax on this basis for each of the three years involved, the Collector alleges that plaintiff is indebted unto the State for additional taxes in the amount of $189,056.54 which he prays judgment for in reconvention. Plaintiff filed an exception of no cause or right of action to the reconventional demand. The case was submitted to the lower Court on a statement of facts set forth in a written stipulation signed by counsel on both sides, together with several exhibits annexed thereto. The district judge handed down written reasons for the judgment in which he upheld the Collector's interpretation of the statute and his method of applying the tax. He accordingly dismissed the plaintiff's suit. He also sustained an exception of no cause or right of action to defendant's reconventional demand and dismissed the same. Plaintiff appealed from the judgment insofar as it dismissed its suit. The Collector did not appeal from that part of the judgment dismissing the reconventional demand and therefore it is no longer an issue in the case.

As incorporated in the Revised Statutes, R.S. 47:601, the statute which concerns this case provides:

> "Sec. 601—Every domestic corporation and *every foreign corporation, exercising its charter, authorized to do or doing business in this state,* subject to compliance with all other provisions of law, except as otherwise provided in this Chapter, shall pay a tax at the rate of one dollar and fifty cents ($1.50) for each one thousand dollars ($1000.00), or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital determined as hereinafter

provided; provided that the minimum tax shall not be less than ten dollars ($10.00) in any case. *The tax levied herein is due and payable for the privilege of carrying on or doing business, the exercising of its charter, or the continuance of its charter within this state.*" (Italics ours.)

Section 602 relates to the determination of taxable capital. It reads as follows:

"Every corporation taxed under this chapter shall determine the amount of its issued and outstanding capital stock, surplus, undivided profits and borrowed capital as the basis for computing the franchise tax levied under this Chapter and determining the extent of the use of its franchise in this state."

Section 603 provides how borrowed capital is to be determined, section 604 how to determine the capital stock and section 605 how surplus and undivided profits are to be determined. Section 606A then provides the method of allocating the taxable capital of the corporation and 606B, that of intercompany items.

Section 606A reads: "For the purpose of ascertaining the tax imposed in this Chapter, every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios:

(1) The ratio that the net sales and other revenue attributable to Louisiana bears to the total net sales and other revenue. The Louisiana sales factor shall be one-half of the sales secured through the efforts of salesmen attached to or sent from offices, agencies, or other places of business within the state, plus one half of the sales of merchandise delivered in Louisiana.
(2) The ratio that the value of all of the taxpayer's property and assets situated or used in Louisiana bears to the value of all of its property and assets wherever

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situated or used. In determining value, depreciation and depletion reserves must be deducted from the book values of the properties in question."

Section 606B which relates to intercompany items provides as follows:

"For the purpose of allocation, investments in, advances to, or revenues from a parent or subsidiary corporation shall be allocated to Louisiana on the basis of capital employed in Louisiana for corporation franchise tax purposes by the parent or subsidiary corporation. *A subsidiary corporation is any corporation the majority of the capital stock of which is actually, wholly or substantially owned by another corporation and whose management, business policies and operations are, howsoever, actually, wholly or substantially controlled by another corporation; which latter corporation shall be termed the parent corporation.*" (Italics ours.)

The contention of the plaintiff, as we view it, is that here we are dealing with taxation of an intangible whose situs under the doctrine of "mobilia sequuntur personam", (movables follow the owner), is at the domicile of the owner; that it is the owner of the intangibles being taxed and they should be deemed to have their situs in the State of Delaware where it, the owner, has its domicile. The contention of the Collector, on the other hand, is that the intangibles should be allocated to Louisiana because Delaware is merely the incorporating or qualifying State of the plaintiff where none of its operations are conducted and none of the intangibles are used in connection with its business; that its business activities are here in Louisiana and the intangibles are used here in connection with those activities and have acquired a business situs here. Further, that the Louisiana Franchise Tax is a tax for the privilege of carrying on or doing business here and therefore it is not limited by the situs of the owner of the intangibles sought to be taxed.

The doctrine "Mobilia sequuntur personam" is not ap-

plicable in cases of this kind. In Metropolitan Life Ins. C. v. New Orleans, 27 S. Ct. 499, 205 U.S. 395, where it is referred to as a "fiction", it is stated that neither that fiction "nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter can be allowed to obscure the truth." Blackstone v. Miller, 188 U.S. 189, 47 L. Ed. 439, 23 Sup. Ct. Rep. 277 is cited as authority for that statement to which significantly, the Court added: "We are not dealing here merely with a single credit or a series of separate credits, but with a business."

In First Bank Stock Corp. v. Minnesota, 57 Sup. Ct. Rep. 677, 301 U.S. 234, the Court stated that:

> "The doctrine that intangibles may be taxed at their business situs, as distinguished from the legal domicile of their owner has usually been applied to obligations to pay money, acquired in the course of a localized business * * *."
>
> "But it is equally applicable to shares of corporate stock which, because of their use in a business of the owner, may be treated as localized, for purposes of taxation, at the place of the business * * *."

The following statement by the Court in Wheeling Steel Corp. v. Fox, 56 Sup. Ct. Rep. 773, 298 U.S. 193 also appears to be quite pertinent:

> "The corporation established in West Virginia what has aptly been termed a 'commercial domicile'. It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the corporation. There, as appellant's counsel well says, 'the management functioned'. The corporation has manufacturing plants and sales offices in other states. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The corporation has made that the actual seat of its corporate government."

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The question with which we are concerned received some consideration by this Court in the case of Bluefields Banana Co. v. Board of Assessors, 49 La. Ann. 43, 21 So. 627, where a foreign corporation was attempting to resist an assessment of the cash it had to its credit in local banks in New Orleans, which had been assessed under a State statute. The corporation has been successful in obtaining an injunction against the Board of Assessors but the judgment by which the injunction had been granted was reversed on appeal. The following statement in the opinion has close relation to the issue now before us:

> "The foreign corporation had an agent here, where it received and where it sold fruit, and received the price for the same. Part of the proceeds were withheld in the hands of the agent for purposes incidental to the prosecution of its business, and part deposited to the credit of the company, subject to the check of its local agent; also for the prosecution of its business here, and for such other purposes as the company might direct it to be applied to. The company transacted business in New Orleans, precisely as did resident business men and firms. It received all the advantages to be derived from the state and city governments which the residents received, and we see no reason why it should not be taxed, as claimed in this proceeding unless there be insuperable legal objections in the way. We find a statute of the state which, by its terms, brings them under the operation of state and city taxation, and we are bound to give effect to its provisions, unless they be in derogation of the constitution. * * * The rule, 'Mobilia sequuntur personam', is a fiction of the law, not resting of itself upon any constitutional foundation, and which gives way before express law, destroying it in any given case where constitutional requirements themselves do not stand in the way."

We think that the stipulation on which this case was submitted to the Court leaves no doubt but that the plaintiff corporation has definitely established a "commercial

domicile" at Shreveport, in Caddo Parish, Louisiana. It has qualified and been authorized to do business in this State since 1928 and has paid, during all these years, the corporation franchise tax due by it on its business which it reported as "Holding Company and Gas Pipeline Business". It maintains its principal office in Shreveport where its principal officers, including the president, vice president and general manager, secretary, treasurer and assistants reside. From this office it collected its revenues and kept deposits in Louisiana banks during the years 1946, 1947 and 1948 averaging several hundred thousand dollars from which it paid dividends to its stockholders throughout the country, and also paid salaries and other expenses.

It kept all the stock of its subsidiaries in its Shreveport office and exercised control over this stock by electing their boards of directors. In many instances the same individual was elected to and served on plaintiff's board and also on the board of directors of its subsidiaries. The point is strongly urged that none of plaintiff's meetings of its board has ever been held in Louisiana; that during the years 1946, 1947 and 1948, all of its board meetings as well as those of its subsidiaries were held in the City of New York and there the policies of the corporation were formulated. But the place where the board's meetings were held would seem to be immaterial in fixing the situs where the intangibles of the corporation could be taxed unless the carrying out of its policies and the management of the corporation's business were, in a large part, conducted at that same place. In this case, the policies were carried on and the greater part of the business of the plaintiff corporation conducted at Shreveport by its officers who resided there, under authority of the board of directors and that is what established for it a "commercial domicile" and gave it a business situs in Louisiana for the purpose of taxing its intangibles used in or incidental to its business here. Applying the provisions of the statute as he construed them, the Collector allocated to Louisiana a proportion of the interest and dividends received by plaintiff from the two subsidiaries; he also allocated to Louisiana a proportion of the amount of plaintiff's investments in and advances to said subsidiaries

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and also a proportion of plaintiff's deposits in Louisiana banks; further, he allocated to Louisiana a proportion of advances to and revenues from Arkansas Pipeline Corporation, a subsidiary of one of plaintiff's subsidiaries. It is these four allocations to which plaintiff specifically objects, its contention being that these are not revenues attributable to Louisiana nor are these assets situated or used in Louisiana.

What plaintiff is contending is that it has little or no revenues attributable to Louisiana nor does it have assets of any consequences situated or used in Louisiana, so that under the arithmetical average of the two ratios given in Section 606A of the statute, the proportion of its "taxable capital" employed in Louisiana would be almost negligible. Be that as it may, the general allocation formula of Section 606A is not the formula under which the Collector is allocating these revenues and assets to Louisiana. He is here applying the provisions of Section 606B, which relate to the allocation of "intercompany items" to Louisiana, and which provides that investments in, advances to, or revenues from a subsidiary corporation shall be allocated to Louisiana as "taxable capital" of the parent corporation on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the subsidiary corporation. This, the Collector contends, means that if the subsidiary, under the general allocation formula, has 50% of its "taxable capital" allocated to Louisiana as capital employed in Louisiana, then 50% of all investments in or advances to a subsidiary corporation by the parent corporation are allocated to Louisiana as "taxable capital" of the parent corporation, and 50% of all revenues received from a subsidiary corporation by the parent corporation are allocated to Louisiana as "taxable capital" of the parent corporation. This latter section would not seem to lend itself to any other interpretation. It is in the nature of a special provision governing the allocation of "taxable capital" in the case of a parent or subsidiary corporation.

Plaintiff contends that this provision is merely a limitation on the amount of assets actually situated or used in

Louisiana which can be allocated to Louisiana under Section 606A; that it does not authorize a tax on assets situated and used outside Louisiana. This could not be the meaning of this provision as the location of the assets of the corporation is of no importance in this statute except insofar as the value of the assets situated within and without Louisiana are used in determining one of the ratios under Section 606A. It is not the actual capital employed in the State of Louisiana but the proportion of the entire "taxable capital" which is allocated to Louisiana, as capital employed in Louisiana, that the tax rate is applied to.

It follows therefore that the allocations of revenues, investments, and bank deposits made by the Collector are in accordance with the Corporation Franchise Tax Act. Plaintiff admitted that the computations of the Collector are correct if Section 606B is given the meaning contended for by the Collector.

This brings us now to consider plaintiff's pleas of unconstitutionality which were urged by it in the alternative.

The first contention is that the provisions of the statute violate the due process clause of both the Federal and State Constitutions. (Fourteenth Amendment of the U.S. Constitution and Sec. 2 of Art. I of the Louisiana Constitution). The plea seems to involve Section 606B of the statute which contains the formula under which the intangibles therein mentioned are to be allocated.

This brings us back, in a way, to the question of the situs of the intangibles and in connection with the contention of due process violation, we think that the following language from the case of Wheeling Steel Corp. v. Fox, supra, has an important bearing:

> "* * * To attribute to Delaware, merely as the chartering state, the credits arising in the course of business established in another state, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering state all the tangible

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possessions of the Corporation without regard to their actual location."

In applying the formula under Sec. 606B, the Collector did not attempt to allocate all of plaintiff's intangibles but only a portion equal to the percentage of capital *employed* in Louisiana by its subsidiaries. Section 601 of the statute, as we emphasized in quoting it at the beginning of this opinion, specifically states that the tax levied is due for the *privilege* of any corporation, domestic or foreign, to do business, exercise or continue its charter within this State and if it provides a method of allocation which is "fairly calculated" to assign to Louisiana that portion of its investments in, advances to or revenues from a subsidiary company "reasonably attributable" to the business it does here, it meets the requirements of due process under the Fourteenth Amendment of the Federal Constitution. In this connection see Butler Bros. v. McColgan, 62 Sup. Ct. Rep. 701, 315 U. S. 501.

Another ground on which unconstitutionality is urged is that Section 606B provides a method of double taxation. Assuming that it does, there is no express prohibition as to this form of taxation pointed out to us and there readily comes to mind instances in which methods of double taxation, some not relating to taxes for the privilege of doing business, are involved and, apparently they are not considered to constitute illegal double taxation.

As to the contention that the statute is unconstitutional in that it denies plaintiff the equal protection of laws, all that need be said is that on such issue we have to be governed by the simple rule that where a tax affects all persons similarly occupied alike and all property in the same classification, the equal protection clause is not violated. See Matthews, et al. v. Conway, et al., 179 La. 875, 155 So. 255 and Interstate Oil Pipe Line Co. v. Guilbeau, 217 La. 160, 46 So. 2d 113.

Counsel for plaintiff point out, by way of illustration, certain situations where the tax might result in inequalities in assessment and in its determination under the statute. The cases they suggest are based on certain hypothetical facts

which do not exist in this case. We, of course, are limited to an interpretation of the statute as it has to be applied to the facts of the case before us and in which no discrimination against the plaintiff or in favor of other corporations similarly situated, appears.

We conclude that all the issues presented have been correctly disposed of by the judgment appealed from and for the reasons assigned it is affirmed at the costs of the plaintiff, appellant herein.

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No. 176. ARKANSAS FUEL OIL CORP. *v.* FONTENOT, COLLECTOR OF REVENUE OF LOUISIANA. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Robert Roberts, Jr.* and *Ben R. Miller* for appellant. Reported below: 225 La. 166, 72 So. 2d 465.

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